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Supreme Court of the United States

October Term, 1977.

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

v.

ALLAN BAKKE,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF AMICUS CURIAE FOR THE ORDER SONS OF ITALY IN AMERICA IN SUPPORT OF RESPONDENT.

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BRIEF AMICUS CURIAE FOR THE ORDER SONS OF ITALY IN AMERICA IN SUPPORT OF RESPONDENT.

This brief Amicus Curiae is filed by the Order Sons of Italy in America with the consent of the parties, as provided in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICUS.

The Order Sons of Italy in America is a fraternal organization of approximately 95,000 members belonging to 22 Grand Lodges in 24 states. All persons of Italian birth or descent, or persons adopted by those of Italian lineage, and their spouses are eligible for membership in the organization. One of the principal purposes of the organization is to participate in the political, social and civic life of the community and in particular to strive toward fair and equal treatment of all individuals regardless of race or national origin. To this end, the Order Sons of Italy in America has established a Commission Against Bias, Bigotry and Prejudice. The chairman of the Commission is Americo V. Cortese, Esq., Prothonotary, Philadelphia County, Pennsylvania.

The interest of the Amicus is that of a constituent minority group which, although it has suffered discrimination for many years, has now become part of the "majority" discriminated against by preferential admissions programs of the type used by Petitioner and many other professional schools and colleges through the country.

The experience of the Italian in this country has been too often that of a minority excluded from positions in the corporate and professional world.[1] For example, surveys of the largest business organizations in Detroit and Chicago have found that Italians and other ethnic minorities have held far fewer positions on the boards of directors and as officers of those institutions than the proportions of such persons in the populations of those cities would lead one to expect.[2] A recent survey of the 20 largest law firms in New York revealed that only 1.6% of the 912 partners in those firms had Italian names.[3] While information concerning the number of persons of Italian origin in the medical profession has not been collected, it is well known that they were among the ethnic groups to which "quotas" were applicable in medical schools and that they were subject to the same kind of discrimination by the medical profession as were the minority groups Petitioner seeks to prefer.

1. Discrimination against Italians in the business world has been recognized by the Office of Federal Contract Compliance Programs in its guidelines on discrimination based on religion or national origin. In particular, the guidelines state,

> "Members of various religious and ethnic groups, primarily but not exclusively of eastern, middle and southern European ancestry, such as Jews, Catholics, Italians, Greeks and Slavic groups continued to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin. These guidelines are intended to remedy such unfair treatment." 41 C. F. R. § 60-50.1(b).

The potential harm to persons of Italian origin, as well as to other members of the "majority" white population, from preferential admissions programs arbitrarily limiting the number of "non-minority" admittees on the basis of race is clear. Persons of Italian descent are a minority which is discriminated against. Under such programs, persons of Italian descent with qualifications equal to or better than those of the persons of the "minority races" are denied admission solely on account of race. The discrimination which the Italians have suffered in the past, and in many respects continue to suffer, may disadvantage some of them in the competition for admission to selective professional schools. Members of Amicus,

2. *Minority Report. The Representation of Poles, Italians, Latins and Blacks in the Executive Suites of Chicago's Largest Corporations.* The Institute of Urban Life for the National Center for Urban Ethnic Affairs (n.d.); *Economic Elite Study—Detroit 1975,* Michigan Ethnic Heritage Studies Center (n.d.).

3. *Law Practice—Judge: Bias a 'No-No' in Partner Promotions,* 63 ABA Journal 613 (1977). *See* J. S. Auerbach, *Unequal Justice—Lawyers and Social Change in Modern America,* 50, 117, 185, 188, 209, 295 (1976).

however, do not seek to participate in a special admissions program that benefits them solely by the accident of birth which places them in a particular racial, ethnic or national group. On the contrary, they would be offended by any program which deals with them on a group basis rather than as individual human beings, and consider that such treatment would bring with it the stigma of inferiority.

Amicus is interested primarily in upholding the principles of equal treatment and opportunity for all persons regardless of race, religion or national origin and believe that Petitioner's preferential program (as well as similar programs) is patently unfair and unjust by making the chances of admission to medical school dependent upon race rather than individual ability.

As members of a discrete, identifiable and disadvantaged minority, these Amici are also concerned about the dangers of increasing racial and ethnic consciousness and inflaming racial and ethnic animosity inherent in a preferential admissions program like the one at the University of California at Davis.

For these reasons, the Order Sons of Italy in America submits this brief in support of the Respondent.

SUMMARY OF ARGUMENT.

A professional school admissions program that uses different criteria for equally qualified candidates based on race and denies admission to equal or more highly qualified candidates solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment. There is no precedent for justification of a discriminatory state policy which imposes significant disadvantages on individuals based upon the inherent uncontrollable accident of race. The only cases in which this Court has allowed racial discrimination which penalizes individuals on the basis of race are the wartime internment cases decided under emergency circumstances in no way relevant to current conditions.

The Fourteenth Amendment applies to racial discrimination against whites as well as blacks and other racial minorities because it requires individual determinations of individual rights and prohibits racially dependent advantages. Moreover, a preferred quota for certain minorities discriminates against other minorities. The characterization of racial discrimination as "benign" or "socially advantageous" does not vitiate the prohibition of the Fourteenth Amendment which protects personal rights rather than group rights. Social engineering cannot become part of the Fourteenth Amendment.

The cases in the last decade in which this Court has upheld classifications based on race did not involve the grant of a benefit or advantage to the members of one race while wholly denying or limiting that benefit to the members of another race. The only arguable exceptions, not applicable to the instant case, are the few cases which approved remedial programs to directly counteract the

effects of officially sanctioned and judicially or administratively determined discrimination within a particular institution.

Regardless of the test which is used to justify discrimination on the basis of race, the type of professional school preferential admissions program involved in this case should not be sanctioned. Such a program creates an outrageous distinction on the basis of race and deprives members of non-benefiting races of the opportunity to pursue their chosen profession and thereby limits their entire future. It destroys perceptions and expectations that advancement, at least in the most learned professions, is based on merit or ability often achieved through hard work. Such a program also poses the danger of preserving racial consciousness, inflaming racial animosities and creating a situation in which all members of the preferred group, regardless of their merit, are considered second-rate members of the profession to the detriment of society as a whole.

The essential reasons advanced by Petitioner and others in support of special admissions programs—to remedy past discrimination and to provide greater racial minority representation in the professions—do not justify the serious deprivation of rights involved in such programs. The record in this case contains no evidence that Petitioner ever discriminated against the minority groups it now seeks to prefer. There is no admission of such a discriminatory policy by the University of California or any of the other professional schools or organizations that have filed briefs in this action. Generalized statements that these minorities have been discriminated against by the medical profession are equally applicable to other minority

groups. The concept that every profession should be composed of persons from minority or special interest groups in proportion to their population would completely demolish the concept of individual rights guaranteed by the Fourteenth Amendment. Representation in a profession, whether it be medicine or some other profession, by members of particular minorities does not insure that such minorities will obtain better professional services since there is no doubt that such minority professionals cannot be compelled to practice in disadvantaged areas. Furthermore, such a goal is completely unworkable since it would reduce admission procedures to little more than statistical surveys. Professional schools and universities would inevitably have different "preferred classes" based on their geographic location and the racial and ethnic population of that area. Insofar as the goals advanced by respondent are proper state interests, they can be achieved through racially neutral alternatives.

ARGUMENT.

I. The Exclusion of an Individual From a Professional School on the Basis of Race Violates the Fourteenth Amendment and Cannot Be Justified on the Basis of Social Engineering.

A. Racial Quotas in Professional Admissions Programs Are Patently Discriminatory.

The preferential admissions program which Petitioner seeks to preserve applies different standards for admission based on the applicant's race. Pursuant to this program, 16% of the positions in the entering class at Davis are reserved for persons belonging to racial minorities designated by the school. Applicants for these positions will be considered and may be accepted although their academic credentials are less than those *required* by the school for *consideration* for the remaining places in the entering class.[4]

In the instant case, it is admitted that Respondent was denied admission to medical school solely on the basis of his race. Had he belonged to one of the preferred minorities, he would have been admitted to the medical school of the University of California at Davis to which he applied.

The admissions program at Davis flagrantly discriminates on the basis of race in three important respects.

4. The record below reflects the fact that applicants with undergraduate grade point averages of less than 2.5 are summarily rejected for regular admission, while members of the preferred minorities will be considered for admission and accepted with such undergraduate grade point averages. Minority group members are also considered for and admitted to Davis with lower MCAT scores than other applicants. *See Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 41; 553 P. 2d 1152 (1976).

First, white applicants whose qualifications are such that they would have been admitted if a quota of spaces were not reserved for members of the preferred races are denied the opportunity to attend medical school. Second, applicants of the non-preferred races are totally denied *consideration* for admission although their academic credentials are the same as those of the preferred minority applicants. If, as Petitioner contends, the individuals who are accepted under the minority program are qualified to complete medical school and join the medical profession although their academic credentials are lower than those of individuals otherwise admitted, then members of the non-preferred races with the same lower academic credentials are unjustifiably denied even an opportunity to compete for admission to medical school solely on the basis of race. Third, the minority groups which the school has selected for preferential treatment are not the only minority groups which have suffered from disadvantages and past discrimination; nor are they the only minorities whose backgrounds cause them to have lower traditional academic credentials. Thus, there is inherent in the preferential program discrimination not only against whites as a whole but against discrete white minorities.[5]

Petitioner argues that there is no discrimination because no one has the right to attend medical school and because all it has done is alter the odds for whites gaining admission.[6] This facile statement simply ignores the fact

5. The Association of American Law Schools states that LSAT scores are accurate predictors of performance at law school. When they set aside a quota for minority applicants with lower scores, they are patently discriminating against those who are more likely to succeed at law school—a result which is an affront to the American ideals of meritocracy, and which necessarily destroys any reasonable basis for their classifications.

6. We are amazed to see that petitioner and others consider 16% (Davis) and 25% (Boalt Hall) of the available places *de minimus*.

that whatever the discretion of Petitioner regarding admission criteria, as a state institution it may not apply different criteria to applicants on the basis of race. Freedom from such racial discrimination is every applicant's right. Semantic arguments attempting to remove the word "quota" from the preferential admissions program are no more than an attempt to elevate form over substance; the racial discrimination of the program is present regardless of the label it carries. Moreover, the impact of such discrimination cannot be minimized; it deprives individuals of one of the most critical opportunities of a lifetime, the scars of which can never be erased.

B. White Persons Are Entitled to the Same Rights Under the Equal Protection Clause as Blacks and Other Racial Minorities.

The Fourteenth Amendment provides all persons with the right to equal protection of the laws. The Amendment is not limited to protection of particular minority groups. Rather it requires the protection of individual rights on an individual basis. Although the Fourteenth Amendment was adopted to protect the former black slaves and it was, therefore, natural that most of the litigation arising under this Amendment dealt with discrimination against such persons, the reach of the Fourteenth Amendment extends to all individuals.

As a result of its historical basis, the Fourteenth Amendment has had particular significance in state policies which discriminate against individuals solely on the basis of their ancestry and race. Such discriminations are "'odious to a free people whose institutions are founded upon the doctrine of equality,'" *Loving v. Virginia*, 388 U. S. 1, 11 (1967). The only reading of the Fourteenth

Amendment consistent with the philosophy and policies of this country, which place the highest values on individual merit rather than group racial classification, requires that the Fourteenth Amendment prohibit discrimination against whites as well as discrimination against blacks or other minority groups. A state policy which grants significant opportunities to one race while denying them to another race, regardless of which is which, is repugnant to the American sense of justice. As long ago as 1948, this Court recognized that the Equal Protection Clause means that persons have a right to be free of racial discrimination no matter what their race:

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Shelley v. Kraemer, 334 U. S. 1, 22 (1948).

There is more at stake under the Equal Protection Clause than the protection of a particular minority which happens to be disfavored at a particular time. What is at stake is that a state be required to make decisions which affect individual rights in a racially neutral manner so that no individual is disadvantaged at any time because of the immutable characteristic of his race. Just as this Court has refused on numerous occasions to uphold state preferences for whites which carry with them the badge of superiority, it should invalidate any state policies which grant superior rights to other races. No individual should

ever have a superior right solely by virtue of his race. If racial or other group preferences are allowed, individual rights will be subject to the influence or popularity of a particular racial or ethnic group at a particular time. As stated by Justice Douglas in his dissenting opinion in *DeFunis v. Odegaard*, 416 U. S. 312, 337 (1974),

> There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

This Court has never had before it the opportunity to review under the Fourteenth Amendment a state policy which wantonly deprives white persons of a significant opportunity solely on the basis of race.[7] However, it follows from *McDonald v. Santa Fe Trail Transportation Co.*, 427 U. S. 273 (1976), that discrimination against whites should be subject to the same strict standard of judicial review as discrimination against other groups. In that case, this Court held that the Civil Rights Act of 1866, 42 U. S. C. § 1981, and Title VII of the 1964 Civil Rights Act applied equally to discrimination against whites as they did to discrimination against other racial groups. Certainly the reach of the Fourteenth Amendment is no less than that of Title VII and Section 1981.

7. In *DeFunis, supra*, this Court declined to review this question on the ground of mootness.

C. There Is no Precedent in the Decisions of This Court for Denying an Individual a Substantial Opportunity Solely on the Basis of Race.

The only cases in which this Court has upheld the wanton deprivation of individual rights on the basis of racial classifications are the wartime internment cases. *Hirabayashi v. United States*, 320 U. S. 81 (1943); *Korematsu v. United States*, 323 U. S. 214 (1944). Even if those cases were to be followed today, the exigencies of war used to justify racial discrimination in those cases at the time do not exist today and are in no way comparable to the justifications advanced by Petitioner. In contrast to those cases, this Court has repeatedly struck down state programs and policies which imposed penalties on a racial basis or worked to the disadvantage of a particular race. *Loving v. Virginia, supra; McLaughlin v. Florida*, 379 U. S. 184 (1964); *Brown v. Board of Education*, 347 U. S. 483 (1954). It also has struck down discrimination based on alienage or national origin treating each as a suspect class. *Graham v. Richardson*, 403 U. S. 365 (1971); *Oyama v. California*, 332 U. S. 633 (1948).

With the exception of the wartime internment cases, most of the cases in which this Court has approved racial classifications have emphasized that no person was, in fact, deprived of an individual opportunity or advantage as a result of the policy or program. *See e.g., United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 97 S. Ct. 996 (1977); *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U. S. 1 (1971). These and other cases which upheld consideration of racial factors have done so only as a remedy for prior judicial, administrative or legislative determinations of discrimination in order to directly benefit the persons who have suffered from the discrimination. *See United States v. Montgomery County*

Board of Education, 395 U. S. 225 (1969); *Franks v. Bowman Transportation, Inc.*, 424 U. S. 747 (1976).[8]

In *United Jewish Organizations* and *Swann*, this Court found that the racial classifications, while used to benefit racial minorities, did not substantially deprive other racial groups of the benefit of the state program or opportunities to share in them. *Swann* merely involved the assignment of pupils to a particular school,[9] and *United Jewish Organizations*, the assignment of voters to a particular voting district. Moreover, in *United Jewish Organizations*, this Court was dealing with a situation involving block voting. Block voting is necessarily a political group activity and district lines will always reflect some advantage to some group. They do not, however, impair individual voting rights. A voting rights policy which would be comparable to the policy of Petitioner and other professional schools would be one in which individual blacks receive more votes than individual whites, so that they can be more proportionally represented.

8. Petitioner's repeated citation of *Morton v. Mancari*, 417 U. S. 535 (1974) as an example of a case in which this Court has approved a governmental program granting a preference based on race is disingenuous. This Court clearly denied that the Indian preference at issue in *Morton v. Mancari* had anything to do with race. The issue in question was the government's relationship to tribal sovereignty. The Court noted: "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather as members of quasi-sovereign tribal entities where lives and activities are governed by the BIA in unique fashion. . . . In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*." *Id.* at 554. The blacks and other minorities preferred by Petitioner on the contrary have been given equal, not separate, treatment by the government. Petitioner (BR. p. 33) compares the preference for Indians to a preference for veterans. This is totally irrelevant since preferences for veterans have nothing to do with racial preferences.

9. As did most of the other desegregation cases cited by Petitioner and Amici.

Recent decisions of this Court limiting the powers of the federal courts to order inter-district remedies in school desegregration cases make clear that state uses of racial classifications are to be narrowly limited and directed against only those organizations which have been judicially determined to have engaged in unlawful discrimination. In particular, the district courts do not have the power to require that innocent suburban districts be included in a desegregation program with a city in which intentional discriminaion has been practiced. *Milliken v. Bradley*, 418 U. S. 717 (1974). In the last week of the 1976 term, this Court reiterated that court ordered desegregation must be based on a finding that the segregation "resulted from intentionally segregative actions on the part of the board." *Dayton Board of Education v. Brinkman*, 45 U. S. L. W. 4910, 4912 (June 27, 1977).

This Court has never permitted a state institution, on its own initiative, to adopt a racial preference as a social engineering device to remedy alleged discrimination by others. Social engineering which seeks to order society pursuant to certain priorities may or may not be "benign" depending upon whether one is favored or disfavored by those priorities. Since the goals of social planning will always depend upon the political views of those in power, there is potential for great abuse. Individual rights under the Fourteenth Amendment should not be caught between the gears of such social machinery.

II. Flagrant State Discrimination Depriving Individuals of Substantial Professional Opportunities on the Basis of Race May Not Be Sanctioned Merely Because the Proponents Characterize Their Motive as "Benign" or "Socially Desirable."

A. The Reasons Proferred to This Court Do Not Justify Blatant Racial Discrimination in Professional School Admissions Programs.

Petitioner and other advocates of preferential quotas rely completely on the notion that such discrimination is benign and socially compelled. Such characterizations, however, do not bestow the imprimatur of constitutionality or even invoke compelling state interests.[10] Certainly it cannot be disputed that the most socially important and compelling state interest is to protect public safety by preventing physical violence and riots. Nonetheless, there is no doubt that segregation of neighborhoods, schools or even recreational facilities would not be imposed regardless of a showing of overt racial animosity and violent threats in a particular community.[11]

The specific reasons advocated by Petitioner and others in support of their special admissions programs are to provide minority representation in the professions so as to deliver professional services to minority groups which may otherwise be deprived of them and to remedy past discrimination.[12]

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10. ". . . [T]he mere recitation of a benign compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U. S. 636, 648 (1975).

11. The state may discontinue a discretionary service on these grounds, *See Palmer v. Thompson*, 403 U. S. 217 (1971), but may not impose segregation.

12. It is also suggested that exposure to minority students is important to a complete professional education. Assuming there is any validity to this amorphous proposition, it is clearly fulfilled as long as there are any minority students and cannot justify a quota of sixteen or twenty-five percent. Moreover, medical students have ample opportunity to deal with racial minorities in their clinical programs.

The first reason—more minority students should be admitted to medical school in order to provide medical services for these minority groups—does not withstand analysis. Rather the concept that minority doctors will tend to serve minority communities demonstrates vividly why the Fourteenth Amendment should be enforced according to its terms without regard to the supposedly benign nature of the social engineering which underlies a particular discrimination. If minority students may be given preference in order to serve their own communities, then who can object to moral or legal compulsion on them to serve those communities? The concept that a black doctor should be *required* to practice in a black neighborhood is, we trust, morally repulsive on its face; but it represents the ultimate logic of the view that socially desirable results justify race oriented state action.[13]

There is no constitutional guarantee that the number of individuals of a particular race in any profession be proportional to their number within the population. If such were the case, it would certainly follow that representation in Congress and in state legislatures as well as the executive branches of state and federal government be likewise proportional to the racial composition of the nation or particularly constituencies. One could argue that the only way such a goal could be achieved with certainty

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12. (Cont'd.)

13. There is no evidence in the record that minority medical school graduates will in fact practice in disadvantaged areas. The delivery of medical services to disadvantaged minorities can certainly be accomplished by racially neutral means by the state or various medical associations.

would be by weighted voting, an idea which would be summarily dismissed. The preposterousness of the notion of racially proportionate representation as a constitutionally justified interest was eloquently stated by Justice Douglas in his dissent in *DeFunis:*

> The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans . . . .

416 U. S. at 342.

If there were any merit to the argument that minority groups are entitled to proportional representation in the professions, the Davis plan must clearly fail for discrimination against other discrete ethnic or national minority groups, as well as women.[14]

The other reason—remedying past discrimination—is totally without merit. There is no evidence in the record and no admissions in the briefs submitted to this Court that the medical school at Davis or the University of California has discriminated on the basis of race. In fact, Petitioner has specifically denied any such policy. (Reply Br. of Pet. for Cert. at 6.) All that this Court is presented with are vague, confusing and often misleading statistics (none of which are contained in the record) as to the number of

14. Women who constitute the majority of the population constitute but a small fraction of the medical profession. *See,* U. S. Bureau of Health Manpower, Department of Health, Education, and Welfare, Pub. No. (HRA) 76-22, *Minorities and Women in the Health Fields: Applicants, Students and Workers* (1975). Certainly women have as great an interest in having women physicians as do the favored minorities in the Davis plan.

minority applicants and minority admissions to various professional schools over two decades. Conspicuously absent from the statistics is how many minority group members would be admitted if Petitioner or others changed their regular entrance requirements and placed lesser reliance on traditional academic credentials. Furthermore, the percentage of places allotted by Davis in the preferential admissions program (16%) significantly exceeds the percentage of racial minority applicants (less than 10%) of the national applicant pool in 1976.[15] This Court has already recognized that it should not determine constitutional rights on the basis of vague statistics. As stated in *Craig v. Boren,* 429 U. S. 190, 208-209 (1976): "In sum, the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loosely fitting generalities . . . ." In *Washington v. Davis,* 426 U. S. 229 (1976), this Court held that statistical evidence of minority performance on certain job related tests was insufficient to demonstrate that the tests were racially discriminatory.

The suggestion by Petitioner and others that the racial minority quota has greater claims to constitutionality because it is "voluntary" turns the constitutional guarantees of the Fourteenth Amendment upside down. The only possible significance of a "voluntary" program would be to take the discrimination outside the ambit of state action. Since Petitioner's actions clearly constitute state action, the repeated assertion that its program is voluntary does not assist it. If this Court is to attach any significance to this factor, it should consider it a negative one. As Justice Brennan has recognized, the use of racial considerations is

15. B. Waldman, *Economic and Racial Disadvantage as Reflected in Traditional Medical School Selection Factors: A Study of 1976 Applicants to U. S. Medical Schools,* p. 15, Association of American Medical Colleges (1977).

more palatable when there is an intervention by an outside governmental authority which can review and limit the preferences granted and protect against the imposition of unnecessary disadvantages on the non-preferred persons. *United Jewish Organizations, supra*, 97 S. Ct. at 1014-1016. The participation of an outside agency, such as a federal or state court or administrative agency, permits all affected groups to express their positions in a public forum. This has been the case in all of the court and administrative orders approving racial considerations. The Davis program and similar programs adopted by particular schools provide no such forum.

B. Racial Tests for Admissions to Professional Schools Have Deleterious and Unjust Effects on Society as a Whole.

Preferences on the basis of race rather than individual merit are abhorrent to our society. This Court has strongly admonished against the use of racial criteria, recognizing that they are inherently detrimental to a free and open society in which persons should be treated on the basis of their individual worth. This case presents a situation in which a racial preference is particularly repugnant because society as a whole has been led to expect that entrance to professional schools is based on individual merit. The holding that racial preferences are permitted in professional schools will have adverse effects not only on students and parents, but on all individuals seeking profession services. Students, parents and other members of the public will have lower perceptions as to the value of individual ability, achievement and ambition. Students, in particular, will lose the incentive to exert the effort necessary to maximize their performance and skills. Potential consumers of professional skills will lose confidence in the professions and may even diminish their use of such services.

Racial classifications necessarily carry with them the implication that people of different races are inherently unequal. The inevitable assumption that will be drawn from racially preferential admissions programs is that the preferred races are inferior to the non-preferred races. A stigma will attach to all members of the preferred races in all professions. In particular, it will create a class of doctors viewed by the public as "second-rate". It is no answer to this problem to say, as does Petitioner, that one can avoid the "stigma" by not applying for special admission (BR, p. 48). The stigma attaches to all members of the preferred race to the detriment of all persons, many of whom may be reluctant to use the services of minority professionals. It is for this among other reasons that members of Amicus do not ask to be considered for special treatment on a group basis.

Any policy which grants or denies benefits on the basis of race can only inflame racial consciousness and awareness, and provoke ill will toward the members of the preferred group. As stated by Justice Brennan:

> [E]ven in the pursuit of remedial objectives an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.
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> [E]ven a benign policy of assignment by race is viewed as unjust in our society, especially by those individuals who are adversely affected by a given classification.

United Jewish Organizations, supra, 97 S. Ct. at 1014.

The sense of injustice and outrage from a preferential admission program is heightened by the fact that those adversely affected are not a monolithic, equally politically powerful group.[16] As Justice Brennan noted: "This impression of injustices may be heightened by the natural consequence of our governing process that the most 'discrete and insular' of whites often will be called upon to bear the immediate, direct cost of benign discrimination." *Id.*

Preferential admission programs involve inherent problems of administration and definition which contain the seeds of unfairness and unworkability and which will ultimately become a battle of statistics. First, there is always the question of which minority groups are to be considered for the preference. Among the admission programs brought to the attention of the Court different minority groups are given preferences.[17] Certainly the preferences in schools in other parts of the country such as the Northeast contain even different definitions of minorities. Under these circumstances there will always be questions of fairness with respect to which groups

16. "But the white majority is pluralistic, containing within itself a multitude of religious and ethnic minorities—Catholics, Jews, Italians, Irish, Poles—and many others who are vulnerable to prejudice and who to this day suffer the effects of past discrimination. Such groups have only recently begun to enjoy the benefits of a free society and should not be exposed to new discriminatory bars, even if they are raised in the cause of compensation to certain racial minorities for past inequities." Lavinsky, *DeFunis v. Odegaard: The 'Non-Decision' With a Message*, 75 Col. L. Rev. 520, 527 (1975).

17. The medical school at Davis prefers blacks, Chicanos and Asians. Boalt Hall adds "native Americans" and deletes Japanese. At the time of *DeFunis*, The University of Washington included "Afro-Americans, Chicanos and American Indians". The AAMC study, *supra* note 15, defines as under-represented minorities "Black American, American Indian, Mexican American and mainland Puerto Rican."

are preferred and which are discriminated against. Every program will then be subject to judicial challenge to determine whether the discrimination can be justified. Furthermore, once the preferred minority groups are selected there will be inevitable questions as to who fits within the definition of each minority group. The state will then be embroiled in unseemly determinations of racial membership.

Petitioner and others suggest that their preferential programs are temporary. However, we note that it is a natural consequence to expand rather than contract existing programs and preferences. The universities will be subject to intense pressure to keep the preferences already given to certain minority groups. Regardless, the deprivation of a constitutional right is not vitiated because the deprivation is temporary, and such deprivation is not temporary as to those individuals already excluded.

C. Petitioner Can Accomplish Its Legitimate Purposes Through Racially Neutral Means.

Petitioner argues that the only way to give racial minorities a fair opportunity for admission to professional schools is to set aside a specified number of places as to which they can compete with lower academic credentials than the non-minority groups. There are, as the Supreme Court of California suggested, racially neutral alternatives.

Perhaps the most propitious alternative is one in which Petitioner alters its criteria for admission to medical school for all persons. Petitioner has suggested that undergraduate grade point averages and MCAT scores are not necessarily reliable predictors of the ability to successfully complete medical school and to become a good physician. If this is so, Petitioner is free to institute a more flexible admissions program for all applicants giving weight

to any disadvantaged background of any applicant.[18] Presumably, among those with disadvantaged backgrounds will be a substantial number of racial minorities. Admittedly this will not give racial minorities a quota of reserved places, but that is precisely the unconstitutional feature of the present preferential admission programs.

The State of California which operates the University of California with its numerous colleges and professional schools, can institute within its system a remedial program to prepare disadvantaged students for admission to medical school. Again, if, as Petitioner suggests, there are a sufficient number of minority students who are interested in attending medical school, they can take advantage of this program and then compete for admission to medical school on an equal basis with all other applicants. Other universities, colleges and professional schools can undertake these same steps.

It is too late at the professional school level to undertake a discriminatory policy which may lead to supplying the public with less than qualified members of critical professions. Steps should be taken and have been taken in the last decade to provide necessary programs at lower educational levels to insure that all qualified individuals are in a position to compete fairly for admission to professional schools.

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18. Petitioner has cited the AAMC study, *supra*, n. 15, not contained in the record, purporting to demonstrate that a preferential program based on economic disadvantage would not result in the admission of significant numbers of racial minorities. Such a study shows only that family finances are not the sole measure of disadvantage. It does not prove that a racially neutral admissions program considering other disadvantaging factors such as quality of lower school education and inability to devote full time to study will exclude racial minorities.

CONCLUSION.

The cause of racial justice cannot be served by racial discrimination. The label "benign" will not cure the harms inflicted on innocent applicants to professional schools, especially those whose own heritage has been filled with prejudice and discrimination. If Petitioner's discriminatory policy is upheld, there will no longer be any basis to believe that this nation continues to embrace a policy of racial neutrality, of equal rights regardless of race, religion or national origin.

The judgment below should be affirmed.

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